LE COPY

FILED
SEP 7 1972
MICHAEL RODAK, JR., CLERK

No. 72-223

In the
Supreme Court of the United States

BERNIE and RUTH HAHN,
Petitioners,

vs.

NORWEGIAN AMERICA LINE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LUCIAN Y. RAY
THEODORE C. ROBINSON
Attorneys for Respondent

Of Counsel:
RAY, ROBINSON, KEENEN & HANNINEN
135 South LaSalle Street
Chicago, Illinois 60603
726-2905

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Counter Statement Of Facts 1

Grounds Why The Cause Should Not Be Reviewed By This Court 6

I. There Is No Conflict Whatsoever Between The Decision Below And Decisions Of This Court And The Second Circuit. Petitioners Simply Seek Another Review Of The District Court's Order Granting Respondent's Motion For Summary Judgment 6

A. The Courts Below Followed Applicable Principles Of Maritime Law As Declared By This Court And The Second Circuit In Holding That Petitioners Were Bound By The Suit Time Provisions Contained In Their Passage Contract 6

B. The Contentions Of Petitioners Rejected By The Courts Below And Raised Again In Their Petition Are Based On Easily Distinguishable Cases 9

C. The Binding Effect Of The Conditions And Limitation Provisions In Petitioners' Cruise Passage Contract Is Established By The Decision Of The Second Circuit In The Baron Case 16

II. Petitioners' Reason II For Granting The Writ Has No Basis In Fact And Meets None Of The Considerations Governing Review On Certiorari Set Forth In Supreme Court Rule 19 20

PAGE

III. Petitioners' Reason III For Granting The Writ Merely Seeks A Review Of The Ruling Of The Courts Below That Four Months Was A Reasonable Time To Require Suit To Be Instituted On Petitioners' Breach Of Contract Claim 21

Conclusion 23

Authorities Cited

Cases

Baron v. Compagnie Generale Transatlantique, 108 F. 2d 21 (2d Cir. 1939) 16

Brown & Guenther v. North Queensview Homes, Inc., 239 N.Y.S. 2nd 842 (N.Y. Sup. Ct. 1963) 21

Capehart v. Heady, 23 Cal. 851 (Cal.App. 1962) 21

Foster v. Cunard White Star, Ltd., 121 F.2d 12 (2d Cir. 1941) 18

Geller v. Holland-America Line, 201 F.Supp. 508 (S.D. N.Y. 1961) 18

Grace, W. R. & Co. v. Panama R.R. Co., 12 F.2d 338 (2d Cir. 1926) 22

Kemelhor v. Furness Withy & Co., Limited, 248 N.Y.S. 659 (N.Y. 1931) 21

Kungsholm, The, 86 F.2d 703 (2d Cir. 1936) 14

Lipton v. National Hellenic American Lines, 294 F. Supp. 308 (E.D.N.Y. 1968) 18, 19

Maibrunn v. Hamburg-American S. S. Co., 77 F.2d 304 (2d Cir. 1935) 12

PAGE

Majestic, The, 166 U.S. 375 (1897) 10

Majestic, The, 30 F.2d 822 (S.D.N.Y. 1928) 22

Mayer v. Zim Israel Navigation Co., 177 F.Supp. 69 (S.D.N.Y. 1959), *aff'd on other grounds*, 289 F.2d 562 (2d Cir. 1961), *cert. denied*, U.S. 889 16

Missouri, K. & T. Ry. Co. v. Harriman, 227 U.S. 657 (1913) 22

Murray v. Cunard Steamship Co., Ltd., 235 N.Y. 162, 139 N.E. 226 (1923) 11

President Polk, The, 43 F.2d 695 (2d Cir. 1930) 21

Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11 (2d Cir. 1968) 8

Stapp v. Italian-American Lines, Inc., 181 F.Supp. 579 (S.D.N.Y. 1960) 15

Toohill v. Cunard Steamship Co., 130 F.Supp. 128 (D. Mass. 1955) 15

STATUTE

46 U.S.C. § 183(b) 20

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-223

BERNIE and RUTH HAHN,

Petitioners,

vs.

NORWEGIAN AMERICA LINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF FACTS

Supplementing petitioners' Statement of Facts, in 1968 Bernie Hahn was a Chicago supermarket executive (R. 15, Ex. Q), he and his wife were the owners of several businesses (R. 24, p. 3) and were seasoned ocean cruise travellers. (R. 3, p. 3). Having arranged through Sentinel Travel Bureau, Inc., to take a 63-day cruise around South America on the Bergensfjord, a ship owned by respondent, either Mr. or Mrs. Hahn picked up their cruise ticket at Sentinel's office in Chicago. (R. 14, p. 2, R. 24, p. 2). This was shortly after December 10, 1968, well in advance of the date petitioners would be required to leave for New York to board the Bergensfjord on January 6, 1969. (R. 14, Ex. A).

On the cover of the ticket picked up by Mr. or Mrs. Hahn was plainly imprinted in large red type, "CRUISE PASSAGE CONTRACT" (R. 39, p. 2a). Inside, at the top, was plainly imprinted, again in large type, "CRUISE PASSAGE CONTRACT No. CT 38649." In spaces below were typed a description of the cruise, the names and address of the Hahns and the cost of their accommodations, the date of issuance and the name and address of the travel agent and embarkation instructions which read:

> "Embarkation 2:00-3:00 PM
> Monday, Jan. 6th, 1969
> Pier 40 — Hudson River
> New York, N. Y."

Immediately below the embarkation instructions, and running the full width of the page, was printed, in capital letters and red ink:

> "IMPORTANT NOTICE: The attention of passengers is especially directed to the terms and conditions of this contract and it is mutually agreed that this contract ticket is issued by the company and accepted by the passenger subject to the terms and conditions set forth below and continued on the reverse side of this page."

Immediately below this notice was plainly imprinted "CONTRACT OF CARRIAGE." Directly below these words commenced the terms of the contract, starting with the paragraph:

> "It is mutually agreed between the Norwegian America Line and each passenger that the passage money is adjusted upon the basis of, and this contract is issued by the Norwegian America Line and accepted by the Passenger subject to all the terms, conditions, limitations, exceptions and provisions

printed, stamped or written on this ticket, on this page and overpage, and that the same constitutes the contract of carriage."

After another paragraph there was printed in capital letters, on the bottom, right hand side of the page:

"(Contract continued on reverse)"

On the reverse side of the first page were printed 22 numbered paragraphs setting forth the respective rights and obligations of the company and the passengers, including certain conditions and limitations with respect to making claims and instituting suits or actions on claims. Paragraph 11 provided that written claims by passengers must be made within fifteen days after leaving the vessel and that:

"Suits and actions to recover for claims shall not be maintainable unless instituted within four months of the date of their accrual or the termination of the voyage whichever shall first occur, . . ."

At the very end of all of the paragraphs of the contract appeared the printed signature:

"NORWEGIAN AMERICA LINE
(Den Norske Amerikalinje A/S)"

At the bottom of the reverse side of the first page there was imprinted in capital letters:

"Passenger's copy of 'contract of carriage' appears on the last two sheets of this ticket."

The first page described above bore the printed notation at the top on the left side "Pursuer's Copy." The next page was an "Embarkation Coupon." The third page

was the "Passenger's Copy." It contained all of the voyage and other information typed on the "Purser's Copy" and "Embarkation Coupon." Below this information was another notice printed in red capital letters and running the full width of the page:

> "IMPORTANT NOTICE: The attention of passengers is especially directed to the terms and conditions of the 'contract of carriage' and it is mutually agreed that the contract ticket is issued by the company and accepted by the passenger subject to the terms and conditions set forth. A copy of the 'contract of carriage' appears on the reverse side of this page and continued on the inside cover of this ticket."

On the back of this page was plainly imprinted "CONTRACT OF CARRIAGE" and on the rest of the page and on the entire inside of the attached cover appeared another complete copy of the contract in much larger type.

The cruise passage contract delivered to petitioners by Sentinel remained in their possession in its entirety until they boarded the Bergensfjord in New York on January 6, 1969. The "Purser's Copy" and "Embarkation Coupon" were then detached, leaving petitioners in possession of the "Passenger's Copy" fastened to the cover. (R. 15, p. 3).

The last contact between petitioners and anyone connected with respondent was on January 14, 1969, the date petitioners disembarked from the Bergensfjord in Vera Cruz, Mexico. Before leaving they were advised by representatives of respondent that they would not be entitled to any refund under the provisions of the cruise passage contract. (R. 15, Ex. J). Petitioners promptly referred the matter to their attorney, Mr. Jerold S. Solovy of the firm of Jenner & Block, and all correspondence from Mr.

Solovy's initial letter of January 18, 1969, demanding a refund of passage money from Vera Cruz onward, to respondent's unequivocal statement of its position with regard to a refund on March 11, 1969 was between Mr. Solovy and respondent's representatives. (R. 16, Ex. G-R) In his letter of March 11, 1969 Mr. Fin Odd, respondent's Deputy Director for North America, referred to a previous offer to refund $800.00, the amount paid by another passenger who transferred to petitioners' cabin after their departure, and concluded:

> "We, therefore, reiterate our position and can only offer $800 against full release, reserving our rights under the passage contract and/or otherwise." (R. 16, Ex. R).

Despite Mr. Solovy's threats of suit if a refund larger than $800.00 was not offered (R. 16, Ex. O) and his obvious familiarity with the nature of petitioners' complaints (R. 16, Ex. G, O & Q), there was complete silence from March 11, 1969 until February 16, 1970 when Mr. Robert C. Keck, Jr., Mr. Solovy's associate, wrote Mr. Odd threatening suit if an offer of adequate compensation was not received. (R. 15, Ex. S). The complaint was not filed until March 6, 1970, nearly fourteen months after the petitioners left the Bergensfjord and nearly a year after Mr. Odd's clear statement that respondent intended to stand on its rights under the passage contract.

GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

THERE IS NO CONFLICT WHATSOEVER BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT AND THE SECOND CIRCUIT. PETITIONERS SIMPLY SEEK ANOTHER REVIEW OF THE DISTRICT COURT'S ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

A.

The Courts Below Followed Applicable Principles Of Maritime Law As Declared By This Court And The Second Circuit In Holding That Petitioners Were Bound By The Suit Time Provisions Contained In Their Passage Contract.

The principal question before the district court, in considering respondent's motion for summary judgment, was whether the suit time limitation in petitioners' cruise passage contract was binding upon them when they denied having read the document or having any knowledge of its contents. (R. 24, p. 2, R. 25, p. 2). To say the least, petitioners' claims of complete ignorance about a cruise passage ticket representing a $7,000.00 investment are very difficult to believe, particularly when the date, time and place they were to embark appeared directly above the red "IMPORTANT NOTICE" directing their attention to the terms and conditions of the contract. Nevertheless, in considering the question of the binding effect of the suit time provision, the district court assumed the validity of petitioners' claims. (R. 39, p. 5).

After carefully reviewing the applicable case law, the district court ruled, in the opinion adopted by the court of appeals in its entirety as if its own (Petition, App. A, p. 1), that petitioners would not be entitled to be excused from the contract terms and conditions, regardless of not having read or had any knowledge of them, if the printed notice was found to be part of the passage contract. (R. 39, p. 5). The cases, the court said, distinguish between provisions in steamship tickets which amount only to notices and provisions which are formally incorporated into the contract of passage. Provisions that are mere notices are not operative unless actually brought to the passenger's attention but provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they were read by the passenger, providing they are not unlawful in content. (R. 39, pp. 6, 7). As to petitioners' ticket, the court said that an examination of the ticket itself demonstrated that the limitation provision was anything but a "mere notice." Describing the "box" as that portion of a cruise passage ticket which usually contains such information as (a) the name of the cruise; (b) the place of departure, destination and return; (c) the sailing date and time; (d) the full name of the passenger(s); (e) the passenger's address; and (f) the total cruise fare, the court said:

> "An even cursory glance reveals that on the face of the ticket immediately below the 'box' is printed in red ink 'IMPORTANT NOTICE,' followed, also in red ink, by a statement that the terms and conditions which followed were accepted by the passenger and the ticket was issued subject thereto." (R. 39, p. 8).

Faced there, as in this Court (Petition, pp. 10, 11), with a contention on behalf of petitioners that the contract conditions were inoperative because no reference to

them was contained in the "box," the district court said it had reviewed the cases cited in support of the contention and that implicit in each case holding for the passenger was the underlying premise that the steamship line had not done all it could reasonably have been expected to do to warn the passenger that the terms and conditions were important contractual limitations affecting the passenger's legal rights. (R. 39, p. 8). Considering this premise with respect to petitioners' ticket, the court said:

> "Here, it is difficult to visualize what further means the defendant might have employed to place Mr. and Mrs. Hahn on notice of the existence of the additional contract terms and conditions. Plaintiffs' argument that such provisions are not part of the body of the contract unless the 'box' itself contains a specific reference thereto mistakenly omits any consideration of the visual effect which the 'IMPORTANT NOTICE' provision here has. Despite the absence of any reference within the 'box,' the printed notice has been placed on the defendant's ticket in such a way as to be inescapably obvious. It is, therefore, unavoidably a part of the Hahns' contract of passage." (R. 39, pp. 9, 10).

Commenting upon *Silvestri* v. *Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11 (2d Cir. 1968), a case strongly urged in support of petitioners' contentions because the Second Circuit there expressed the opinion that the draftsmen of the ticket under consideration should have been able to produce a much more significant warning, the district court said:

> "The warning on defendant's ticket is not ineffectively positioned, diminutively sized or so artfully camouflaged that its presence is concealed. On the

contrary, as we have previously observed, it is difficult to visualize how the defendant could have produced a more efficacious, eye-catching warning than that which was on the Hahns' cruise passage contract.

"We hold, therefore, that the notice imprinted in red lettering and placed on the face of the ticket immediately below the 'box' was sufficiently eye-catching and conspicuous as to incorporate the terms and conditions in the ticket contract and, accordingly, to entitle the steamship line to avail itself thereof." (R. 39, p. 11).

Commenting upon a contention that the printed conditions relied upon were too small to be adequately incorporated into the contract, the district court stated:

"It is true that the court in *Silvestri* found that the ticket was insufficient to incorporate conditions imprinted thereon into the passage contract. However, the test is not the size of type alone but also whether the notice is readily legible. Cf., *Lipton* v. *National Hellenic-American Lines,* 294 F.Supp. 308 (S.D.N.Y. 1968). In the present case, the notice is so arranged as to constitute a formal part of the contract and the specific provision here involved is readily legible." (R. 39, p. 11).

B.

The Contentions Of Petitioners Rejected By The Courts Below And Raised Again In Their Petition Are Based On Easily Distinguishable Cases.

The contention advanced on pages 8 through 11 of the petition to the effect that contract terms and conditions are binding without a passenger's knowledge only if such conditions are specifically referred to within the "box" and that only matter within the "box" constitutes the body of the contract is not a correct statement of the law

and it properly was rejected when advanced in the courts below. The cases cited in support of the contention are easily distinguishable.

The Majestic, 166 U.S. 375 (1897) (Petition, p. 9), concededly is one of the landmark cases on the subject under discussion but it most assuredly is not authority for the contention that only matter in the "box" of a passage ticket constitutes the body of the contract. The ticket involved is reproduced in the opinion and we invite a comparison between it and petitioners' ticket. It will be noted that the statement on the face of the ticket in *The Majestic* referred only to "These Directions and Notices to Passengers *below*" as forming part of the contract ticket. There was no reference whatsoever *on the face* of the ticket to any contract conditions. Conditions, including a baggage value limitation, were printed on the back of the ticket under the words "NOTICE TO PASSENGERS" but the only reference on the face of the ticket to anything on the back was a bracket containing the words "See Back" in the lower right hand corner. (In connection with subsequent discussions of petitioners' contentions about the "box," it is also important to note that all of the notices setting forth conditions and limitations in the ticket in *The Majestic* appeared *below* the signature of the steamship company.)

The passengers in *The Majestic* had not read their tickets and had no knowledge of the conditions printed on the back. The holding of the court was that:

> "On the evidence, we are unable to conclude that the libellants should be held bound, as a matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper, in terms or by reference."

The landmark case distinguishing between "mere notices" and binding provisions in steamship ticket contracts is *Murray* v. *Cunard Steamship Co., Ltd.*, 235 N.Y. 162, 139 N.E. 226 (1923), in which the New York Court of Appeals held that a passenger was bound by a provision requiring written notice of claim within a specified period despite the passenger's claim that he had not read the ticket and had no knowledge of the limitation provision. Judge Cardozo's opinion stated that "The plaintiff's ticket . . . is described in large type as a 'cabin passage contract ticket.' It provides, again in large type, that 'this contract ticket is issued by the company and accepted on the following terms and conditions.' . . . At the top of the ticket is printed a notice 'The attention of Passengers is specially directed to the terms and conditions of this contract.'" The reason the passenger was held to be bound by the claim limitation provision was that:

> "This is not a case of a mere notice on the back of a ticket, separate either in substance or in form from the body of the contract. The Majestic, 166 U.S. 375, 17 Sup. Ct. 597, 41 L.Ed. 1039. Here the condition is wrought into the issue, the two inseparably integrated. This ticket, to the most casual observer, is as plainly a contract, burdened with all kinds of conditions as if it were a bill of lading or a policy of insurance. 'No one who could read could glance at it without seeing that it undertook * * * to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination.' Fonseca v. Cunard S.S. Co., 153 Mass. 553, 27 N.E. 665, 12 L.R.A. 340, 25 Am. St. Rep. 660. In such circumstances, the act of acceptance gives rise to an implication of assent. 1 Williston on Contracts, §§ 90, 90a, 90b; Fonseca v. Cunard S.S. Co.,

supra; New York Cent. & H. Ry. Co. v. Beaham, supra. *The passenger who omits to read takes the risk of the omission.*" (Emphasis added)

The contention advanced in the petition about the body of the contract being confined to the "box" is based upon five cases. In each case the decision in favor of the passenger was controlled by the location of the notices and the terms and conditions *relative to the location of the signature of the steamship company* plus, in some of the cases, uncomplied with provisions for the signature of the passenger. The ticket involved in each case and petitioners' ticket were entirely different in these controlling aspects.

The opinion in *Maibrunn* v. *Hamburg-American S. S. Co.*, 77 F.2d 304 (2d Cir. 1935) (Petition, p. 10), discloses the facts controlling the court's conclusion that a claim notice provision on the back of a steamship ticket was not binding on a passenger who asserted that he had not examined his ticket and had no knowledge of the provision:

". . . On the face of the ticket, *but at one side of the printing and writing which formed the contract proper,* so far as there was one, was a legend reading as follows: 'Notice. The attention of passengers is especially directed to the terms and provisions of this contract printed on the reverse side, *which must be signed by the passenger* and the agent.' On the back was a clause that written notice of any claim with full particulars must be served on the defendant within sixty days after termination of the voyage. *The plaintiff never personally signed the ticket,* and though it was signed by the 'travel bureau' from which he bought it, this was certainly done, not as his agent but as the defendant's. This abundantly

appears from the fact that the 'bureau' not only signed on the back as the defendant's agent, but was the only person signing the contract for the defendant *on its face*. Thus the question is whether the legend charged the plaintiff with what was on the back, merely because he accepted the ticket, though without knowledge, for he had not examined it." (Emphasis added)

Commenting upon *The Majestic,* supra, the court continued:

"While the form of that notice also was not the same, we understand the case to decide that, though a passenger is bound by all that is in the contract itself, in order to charge him with other stipulations they must be incorporated into the body of it, at least by reference. A mere notice on the front of the ticket, which is not part of the contract, charges him only if he sees it in season."

Acknowledging that nice distinctions were sure to arise, the court went on to say:

"Yet, as we understand it, just this distinction does exist; only the contract proper charges the passenger, and *the contract is taken as those words which the carrier in some way authenticates by its own signature;* notices and legends *alongside* are not part of it." (Emphasis added)

Expressing some doubt as to how satisfactory its result was in theory, the court concluded that it was a practical compromise, saying:

". . . At least there is no hardship in holding that the limitations on the back of the ticket were no part of the contract at bar; the defendant had required them to be signed by the passenger and failed to get the plaintiff to do so."

The *Maibrunn* case was followed in *The Kungsholm,* 86 F.2d 703 (2d Cir. 1936) (Petition, p. 10), another case involving a steamship cruise ticket provision requiring written notice of claim within a specified period after the passenger disembarked. The ticket provided a space for the passenger's signature but the court found that it was not signed before the cruise began and that the validity of the limitation provision had to be decided on the form of the ticket when it was received by the passenger a day before he sailed. In *The Kungsholm,* as in the case at bar, the contention was advanced that the contract was confined to the "box." The opinion reads:

> "It is the contention of the libelant that the contract is contained in the 'box,' covering the left-hand side of the ticket. This sets forth the name of the passenger, the amount of passage money paid, the accommodations he is to occupy, the name of the ship, 'Kungsholm Sailing from New York Feb. 16, 1934 at 5 P.M. from Pier 97, N.R. foot of W. 57th St. Booked as per Itinerary to West Indies Cruise,' and the passenger's home address, Philadelphia. This is followed by the carrier's name, the rubber stamped signature of its Philadelphia agent, and the penciled initial of the person who issued the ticket. In the light of the foregoing authorities we must say that this was the contract of transportation unless the passenger had knowledge of the printed condition which the carrier relies upon. It is true that printed matter *to the right* of this 'box' is headed 'Cruise Contract' and states in large type, 'The following stipulations are a part of this contract which must be signed by the passenger on the overpage immediately upon its receipt.' *But there is nothing above the carrier's signature to incorporate expressly or by reference any of these stipulations;* and, as already stated, there is nothing to show Mr. Moran or his agent had knowledge of

them before he embarked. In the Maibrunn Case also there was a notice on the face of the ticket calling the attention of the passenger to conditions printed on the back." (Emphasis added.)

In *Stapp* v. *Italian-American Lines, Inc.,* 181 F.Supp. 579 (S.D.N.Y. 1960) (Petition, p. 11), the ticket was signed by the carrier's agent below the "box." The information in the "box" was in both English and Italian. *Following the agent's signature* were terms and conditions printed only in Italian. At the end there was an acknowledging paragraph in English and Italian to be signed by the passenger but it was not signed by the plaintiff. On those facts the court held that the entire contract of transportation appeared on the first page of the ticket in the "box" *above the defendant's signature* and denied a motion for summary judgment on the authority of *The Kungsholm.*

The position of the carrier's signature was regarded as decisive in *Toohill* v. *Cunard Steamship Co.,* 130 F. Supp. 128, 129 (D.Mass. 1955) (Petition, p. 11). The opinion reads:

"The ticket described in The Majestic, however, does not bear so close a resemblance to the ticket in the case at bar as that involved in The Kungsholm, 2 Cir., 86 F.2d 703, 705. There, as here, the 'box' on the face of the ticket contained the essential elements of the contract of carriage, and *the signature of the defendant's agent was in the 'box', rather than at the foot of the '"terms and conditions"'.* The Court there held that *since the defendant's signature was in the box,* and since the numbered paragraphs containing the limitation provisions were not incorporated textually or by reference into the box, the limitations were not a part of the contract of carriage. The same is true here. The Court of Appeals for the Second Circuit regarded *the position of the*

> *carrier's signature* in The Kungsholm as 'decisive against the carrier.' Baron v. Compagnie Generale Transatlantique, 2 Cir., 108 F.2d 21, 23. It is likewise decisive against this carrier on its motion for summary judgment." (Emphasis added)

A motion for summary judgment was denied for exactly the same reason in *Mayer* v. *Zim Israel Navigation Co.*, 177 F.Supp. 69 (S.D.N.Y. 1959), *aff'd on other grounds*, 289 F.2d 562 (2nd Cir. 1961), *cert. denied*, 368 U.S. 889 (Petition, pp. 10, 11).

C.

The Binding Effect Of The Conditions And Limitation Provisions In Petitioners' Cruise Passage Contract Is Established By The Decision Of The Second Circuit In The Baron Case.

Petitioners have avoided any reference to one of the cases discussed by the district court (R. 39, pp. 5, 6, 7), *Baron* v. *Compagnie Generale Transatlantique*, 108 F.2d 21 (2d Cir. 1939), although the steamship ticket involved in that case cannot be distinguished in any significant respect from petitioners' cruise passage contract. Affirming the district court's dismissal of a passengers' suit for failure to comply with a fifteen day written notice of claim provision in the ticket which had not been read by the passengers, the court of appeals said:

> ". . . The point principally contested is whether the provision regarding notice was part of the contract of transportation. The ticket was headed 'Passage Contract. Subject to the Terms Stated on This Page and Overpage.' Then came a blocked space across the page for the name of the steamer, ports, date of sailing, names of passengers, ocean fares. *Beneath the space* were the words *in prominent red type*, 'Passen-

gers should read the terms of the contract of carriage stated below and overpage, their particular attention being called to the limitations of liability therein contained.' This sentence was followed by the heading 'Terms of Contract—Read Before Accepting.' The carrier's agreement to carry the passenger in consideration of the fare was then set forth, followed immediately by provisions in numbered paragraphs. The numbered paragraphs began near the foot of the page and continued over on the back. The paragraph relative to notice of claims was paragraph 6. *At the end of the numbered paragraphs was the printed signature of the carrier.*

• • •

"The distinction laid down in The Majestic, 166 U.S. 375, 17 S.Ct. 597, 41 L.Ed. 1039, is between provisions in a steamship ticket which amount only to notices and provisions which are formally incorporated into the contract of passage. Provisions that are mere notices are not operative, unless actually brought to the passenger's attention. Baer v. North German Lloyd, 2 Cir., 69 F.2d 88; Maibrunn v. Hamburg American S.S. Co., 2 Cir., 77 F.2d 304; Bellochio v. Italia Flotte Riunite Cosulich Line, 2 Cir., 84 F.2d 975; The Kungsholm, 2 Cir., 86 F.2d 703. On the other hand, provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they were read by the passenger, provided they are not unlawful in content. The Leviathan, 2 Cir., 72 F.2d 286; Murray v. Cunard S.S. Co., 235 N.Y. 162, 139 N.E. 226, 26 A.L.R. 1371. *In the present case the form of the ticket shows unmistakably that the numbered paragraphs under the heading 'Terms of Contract' were incorporated textually into the contract of passage. The* case is not to be distinguished from Murray v. Cunard S.S. Co., supra.

"Of the authorities relied on by the plaintiffs, The Kungsholm, supra, is closest to this case. *There the carrier's signature was not at the foot of the stipulations but was in the box on the face of the ticket. We regarded that fact as decisive against the carrier. In the present case the signature or authentication of the carrier appears at the foot of the 'Terms of Contract,' and at no other place. Everything printed on the ticket rebuts the contention that the contract of carriage was restricted to the blocked space for names, dates and fares.* We see no escape from the conclusion that the provision requiring written notice of claim was part of the contract of transportation and was therefore binding on the plaintiff." (Emphasis added)

Comparing petitioners' ticket point by point with the Barons' ticket, both (a) were headed "Passage Contract"; (b) had a "box"; (c) had a notice *below the box in red type* calling attention to the terms of the contract of carriage below and on the reverse side or overpage; (d) followed the notice with the heading "Terms of Contract" or "Contract of Carriage"; (e) followed the headings immediately with the provisions of the contract and continued them over on the back; and (f) placed the printed signature of the carrier *at the foot* of the "Terms of Contract" or "Contract of Carriage" and at no other place.

Steamship tickets vary in form, size and arrangement. Some have references to terms and conditions in the "box" [*Geller* v. *Holland-American Line*, 201 F. Supp. 508 (S.D. N.Y. 1961)], some commence in the box, are carried on the face of the ticket and back into the box [*Foster* v. *Cunard White Star, Ltd.*, 121 F.2d 12 (2d Cir. 1941)] and others merely run through the ticket [*Lipton* v. *National Hellenic American Lines*, 294 F.Supp. 308 (E.D.N.Y.

1968)]. In all cases upholding unread limitation provisions, however, it will be found that the references to terms and conditions or the terms and conditions themselves appear *above* the signature of the carrier as in *Baron* instead of *below* the signature as in *The Kungsholm*. And it will be found, as the district court held with respect to petitioners' ticket, that the courts felt that the steamship lines had done all they could reasonably have been expected to do to warn the passenger that the terms and conditions were important contractual limitations affecting the passenger's legal rights. Or, as stated in another way in *Lipton* v. *National Hellenic Lines, supra,* that the ticket did not fail "to come up to the standard of reasonable communicativeness that could be inferred from the forms of other carriers' tickets." 294 F.Supp. at 311.

Clearly the district court considered the entire body of maritime law on the question presented and was correct in holding that:

> "Although plaintiffs correctly evaluate the holdings of the earlier decisions, they do not properly apply the legal principles enunciated therein to the facts of this case." (R. 39, p. 7).

It is equally clear that the courts below followed the law as enunciated in the decisions of this Court and the Second Circuit and that no conflict whatsoever exists between those decisions and the decision in petitioners' case.

II.

PETITIONERS' REASON II FOR GRANTING THE WRIT HAS NO BASIS IN FACT AND MEETS NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI SET FORTH IN SUPREME COURT RULE 19.

The record is bereft of any references to the size of respondent's organization or any facts to support the assertion that respondent occupied any bargaining position superior to that of petitioners. Any intimation that claim and suit time limitation provisions in steamship passage contracts are contrary to public policy is easily answered not only by reference to the numerous decisions heretofore discussed concerning the validity of such provisions but by the fact that the Congress of the United States has tacitly recognized the validity of such provisions. Irrespective of what periods may be prescribed by state statutes of limitation, the only regulation of claim and suit time limitations in steamship passage contracts executed in the United States is set forth in 46 U.S.C. § 183b(a), namely that:

> "(a) It shall be unlawful for the . . . owner of any seagoing vessel . . . to provide by . . . contract . . . a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period to be computed from the day when the death or injury occurred."

By no stretch of the imagination can petitioners' unsupported assertions on pages 15 and 16 of the petition conform to the provisions of Rule 19 of this Court.

III.

PETITIONERS' REASON III FOR GRANTING THE WRIT MERELY SEEKS A REVIEW OF THE RULING OF THE COURTS BELOW THAT FOUR MONTHS WAS A REASONABLE TIME TO REQUIRE SUIT TO BE INSTITUTED ON PETITIONERS' BREACH OF CONTRACT CLAIM.

It is conceded that contractual limitation periods which are unreasonably short are against public policy and unenforceable. It is also conceded that in determining whether a particular contract limitation period is reasonable in length, the court should consider the special circumstances of each case. However, the cases cited on page 16 of the petition most assuredly do not hold that a four month suit time limitation is unreasonable. On the contrary, the majority support the reasonableness of a four month suit time provision.

Brown & Guenther v. *North Queensview Homes, Inc.*, 239 N.Y.S. 2nd 842 (N.Y. Sup. Ct. 1963), simply held that a provision in a non-maritime contract requiring that a demand for arbitration of a dispute be made with *fifteen days* was unreasonable.

In *The President Polk,* 43 F.2d 695 (2 Cir. 1930), a *thirty* day suit time limitation in a bill of lading was held to be unreasonable and ineffective to bar prosecution of a suit instituted in *less than four months.*

Kemelhor v. *Furness Withy & Co., Limited,* 248 N.Y.S. 659, held a *two months* suit time limitation for baggage damage in a passage contract to be unreasonable and not a bar to a suit instituted in *five months.*

However, in *Capehart* v. *Heady,* 23 Cal. 851 (Cal. App. 1962), it was held that the reasonableness of a time limita-

tion in a contract was a question of law for the court to decide and a limitation of *three months* was held to be reasonable.

This Court has declared that a bill of lading provision requiring suit to be brought within *ninety days* is not unreasonable. *Missouri, K. & T. Ry. Co.* v. *Harriman,* 227 U.S. 657, 673 (1913).

Even if authorities could have been cited in the petition to support the contention that the suit time limitation in petitioners' contract was unreasonable, it could not be contended that there was no contractual time limitation at all. The authorities cited in the petition and other authorities on the same point clearly establish that where a suit time limitation is found to be unreasonable under the circumstances of a given case, the court will merely expand the time so as not to bar a suit filed within a reasonable time. *W. R. Grace & Co.* v. *Panama R. R. Co.,* 12 F.2d 338 (2 Cir. 1926); *The Majestic,* 30 F.2d 822 (S.D.N.Y. 1928).

What the petitioners did immediately after leaving the Bergensfjord or in the months thereafter is of no moment. They had referred the matter to their attorneys and the latter had lodged a claim on their behalf with respondent within a week. All facts required to institute a suit were then at hand. (R. 15, Ex. G). Upon receipt of Mr. Odd's letter of March 11, 1969 (R. 15, Ex. R), petitioners' attorneys could have no doubts about respondent's settlement position and its intention to defend on its rights *under the passage contract.* If counsel for petitioners did not have their clients' copy of the passage contract, a telephone or mail request to respondent's Chicago office would have enabled them to obtain a duplicate.

The district court clearly did not err when it ruled, with respect to the contention that the four month limitation was unreasonable:

> "It is apparent that plaintiffs were on notice by mid-March of 1969 of the defendant's intention to stand on its rights under the passage contract. Within two months of their having left the Bergensfjord, plaintiffs had exhausted all possibilities for a negotiated settlement. Under such circumstances, a four months limitation period was not unreasonable. Plaintiffs had ample time to file their claim, attempt to negotiate a settlement, and after negotiations failed to file suit. Instead, they waited until March 6, 1970, almost one year later, before filing suit." (R. 39, pp. 15, 16)

CONCLUSION

Petitioners do not have any grounds for a review of this cause and their petition for a writ of certiorari should be denied.

Respectfully submitted,

LUCIAN Y. RAY
THEODORE C. ROBINSON
Attorneys for Respondent

Of Counsel
RAY, ROBINSON, KEENEN & HANNINEN
135 South LaSalle Street
Chicago, Illinois 60603
726-2905

September 6, 1972